JURISDICTION OVER IMMIGRATION PETITIONS

I. OVERVIEW

The jurisdictional provisions of the Immigration and Nationality Act ("INA") were revised in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),[1] and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[2] "Before enactment of IIRIRA, judicial review of most administrative action under the INA was governed by 8 U.S.C. § 1105a, a special statutory-review provision directing that 'the sole and exclusive procedure for . . . the judicial review of all final orders of deportation' shall be that set forth in the Hobbs Act, . . . which gives exclusive jurisdiction to the courts of appeals." *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999). "IIRIRA . . . repealed the old judicial-review scheme set forth in § 1105a and instituted a new (and significantly more restrictive) one in 8 U.S.C. § 1252." *Id.* at 475. Cases that were pending when IIRIRA took effect on April 1, 1997, are governed by § 1105a, as modified by the IIRIRA transitional rules. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997).

The REAL ID Act of 2005[3] made several significant changes to the judicial review provisions of the INA, including eliminating statutory and non-statutory habeas jurisdiction over final orders of removal, deportation and exclusion, and making a petition for review filed with an appropriate court of appeals the sole and exclusive means for judicial review of such orders. *See* REAL ID Act § 106(a) (amending 8 U.S.C. § 1252). In addition, the REAL ID Act expanded the scope of direct judicial review of final orders of removal, deportation and exclusion, including those involving criminal aliens, by explicitly providing for review of all constitutional and questions of law related to such final orders. *See* REAL ID Act § 106(a)(1)(A); 8 U.S.C. § 1252(a)(2)(D) (as amended). The REAL ID Act also

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[1] Pub. L. No. 104–208, 110 Stat. 3009, *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996) *and by* NACARA, Pub. L. No. 105–100, § 203(a)(2), 111 Stat. 2160 (1997).

[2] Pub. L. No. 104–132, 110 Stat. 1214.

[3] Pub. L. No. 109-13, 119 Stat. 231 (2005).

provides that a petition for review filed under IIRIRA's transitional rules shall be treated as a petition for review filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified). The REAL ID Act's amendments to the judicial review provisions of the INA and IIRIRA are effective as to all final administrative orders of removal, deportation, or exclusion issued before, on, or after May 11, 2005, the date of enactment. *See* REAL ID Act § 106(b) (uncodified).

II. APPLICABLE STATUTORY PROVISIONS

Petitions for review were previously divided into three categories for purposes of judicial review:

A. Permanent Rules: The new rules in 8 U.S.C. § 1252 apply to "removal" proceedings initiated on or after April 1, 1997. *See, e.g., Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004). Removal proceedings commence with the filing of a charging document, called a Notice to Appear, with the Immigration Court. *See* Commencement of Proceedings, below.

B. Old Rules: The judicial review provisions in 8 U.S.C. § 1105a, as amended by AEDPA, apply if the final order of deportation or exclusion was entered before October 31, 1996. *See Velarde v. INS*, 140 F.3d 1305, 1309 n.3 (9th Cir. 1998) (holding that the old rules applied where the BIA decided case on September 30, 1996).

C. Transitional Rules: Where deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, the IIRIRA transitional rules apply. *See Kalaw v. INS*, 133 F.3d 1147, 1150 (9th Cir. 1997). Transitional rule cases are governed by 8 U.S.C. § 1105a, as modified by the "Transitional Changes in Judicial Review," found in IIRIRA § 309(c)(4). The transitional rules are not codified, and are located in Pub. L. No. 104–208, 110 Stat. 3009 (Sept. 30, 1996), *as amended by* Pub. L. No. 104–302, 110 Stat. 3656 (Oct. 11, 1996).

The Ninth Circuit has not yet addressed in a published opinion to what extent these designations are still relevant in light of the REAL ID Act's amended review provisions. However, the REAL ID Act directs that a petition for review filed under IIRIRA's transitional rules shall be treated as a petition for review filed under the permanent rules. *See* REAL ID Act § 106(d) (uncodified).

III. GENERAL JURISDICTIONAL PROVISIONS

A. Commencement of Proceedings

Deportation or removal proceedings "commence" on the date the charging document is filed with the immigration court. *Armendariz-Montoya v. Sonchik*, 291 F.3d 1116, 1119–21 (9th Cir. 2002) (holding in pre-IIRIRA case that deportation proceedings commence when the Order to Show Cause ("OSC") is filed with the immigration court); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 597–98 (9th Cir. 2002) (holding that removal proceedings commence when the Notice to Appear ("NTA") is filed with the immigration court); *see also United States v. Hovsepian*, 359 F.3d 1144, 1165 (9th Cir. 2004) (en banc). The relevant date is the filing of the charging document, not the service of the document on the alien. *See Cortez-Felipe v. INS*, 245 F.3d 1054, 1056–57 (9th Cir. 2001) (holding that proceedings did not commence until the INS filed the NTA, even though the INS served petitioner with an OSC before April 1, 1997).

Merely presenting oneself to the immigration service does not commence proceedings. *See Lopez-Urenda v. Ashcroft*, 345 F.3d 788, 792–94 (9th Cir. 2003) (filing asylum application before the passage of IIRIRA did not commence proceedings or lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1108 (9th Cir. 2003) (holding that the filing of an asylum application before the IIRIRA effective date did not lead to a settled expectation of placement in deportation, rather than removal, proceedings); *Jimenez-Angeles*, 291 F.3d at 600 (holding that deportation and removal proceedings do not commence upon the initial contact between the applicant and the INS).

This court makes no distinction between AEDPA and IIRIRA in determining when deportation proceedings commence. *See Armendariz-Montoya*, 291 F.3d at 1120 (noting distinction drawn by the First Circuit).

B. Final Order of Deportation or Removal

1. Definition

"The term 'order of deportation' means the order of the special inquiry officer, or other such administrative officer to whom the Attorney General has delegated the responsibility for determining whether an alien is deportable, concluding that the alien is deportable or ordering deportation." 8 U.S.C. § 1101(a)(47)(A). A "special inquiry officer" refers to an Immigration Judge. *See Molina-Camacho v. Ashcroft*, 393 F.3d 937, 940 (9th Cir. 2004).

The BIA is restricted to affirming orders of deportation or removal, and may not issue them in the first instance. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 883 (9th Cir. 2003) (holding in habeas proceeding that the BIA acted beyond its authority when it vacated the IJ's termination of removal proceedings, and issued a removal order in the first instance). "There is simply no 'authority' under the INA or any regulation for the BIA to issue an order of removal." *Molina-Camacho*, 393 F.3d at 941. "The BIA's *ultra vires* act of issuing an order of removal in the first instance renders that portion of the proceedings a 'legal nullity,'" and no final order of removal exists that would provide jurisdiction under 8 U.S.C. § 1252. *Id.* 941–42 (treating petition for review as a petition for habeas corpus, and transferring case to the district court under 28 U.S.C. § 1631).

Note that the Ninth Circuit has not yet addressed whether or how the REAL ID Act, which eliminated statutory and non-statutory habeas review of final orders of removal, deportation, or exclusion, affects the court's practice of converting *Molina-Camacho* type petitions for review into petitions for writ of habeas corpus and transferring them to the district courts. *See* 8 U.S.C. § 1252(a)(2)(A), (B), (C) (as amended by the REAL ID Act of 2005). By its own terms, however, the REAL ID Act eliminated habeas review over only *final orders* of removal, deportation or exclusion, and in *Molina-Camacho*, this court determined that it lacked jurisdiction because there was *no* final order of deportation.

An order of deportation "shall become final upon the earlier of (i) a determination by the Board of Immigration Appeals affirming such order; or (ii) the expiration of the period in which the alien is permitted to seek review of such order by the Board of Immigration Appeals." 8 U.S.C. § 1101(a)(47)(B); *see also*

Noriega-Lopez, 335 F.3d at 882–83; *Kalaw v. INS*, 133 F.3d 1147, 1150 n.4 (9th Cir. 1997) (final order includes BIA denial of a motion to reopen).

If the BIA grants a petitioner's motion to reopen, this court lacks jurisdiction over the petition for review because "there is no longer a final decision to review." *Lopez-Ruiz v. Ashcroft*, 298 F.3d 886, 887 (9th Cir. 2002) (order) (dismissing, without prejudice, for lack of jurisdiction); *Timbreza v. Gonzales*, 410 F.3d 1082, 1083 (9th Cir. 2005) (order) (dismissing petition and advising parties to notify the court when the BIA grants a motion to reopen while a petition for review is pending).

2. Scope of "Final Order" of Deportation or Removal

The Supreme Court interpreted the scope of the term "final order of deportation" in *INS v. Chadha*, 462 U.S. 919 (1983), holding "that the term final orders in § 106(a) [8 U.S.C. § 1105a(a)] includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing," *id.* at 938 (internal quotation marks omitted); *see also Montes v. Thornburgh*, 919 F.2d 531, 535 (9th Cir. 1990); *Mohammed-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984).

Under the permanent rules, "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9). The Ninth Circuit has held that section 1252(b)(9) "speaks to . . . the need to consolidate (or 'zip') *petitions for review* into one action in the court of appeals." *Flores-Miramontes v. INS*, 212 F.3d 1133, 1139 (9th Cir. 2000); *see also Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 482–83 (1999) (describing § 1252(b)(9) as a "general jurisdictional limitation" which "channels judicial review" of immigration actions and decisions, and acts as a "'zipper' clause").

C. Timeliness

1. Petitions for Review

"The petition for review must be filed not later than 30 days after the date of the final order of removal." 8 U.S.C. § 1252(b)(1); *see also Singh v. INS*, 315 F.3d 1186, 1188 (9th Cir. 2003); *Narayan v. INS*, 105 F.3d 1335 (9th Cir. 1997) (order); IIRIRA § 309(c)(4)(C) (transitional rules). "This provision applies to all final orders of exclusion or deportation entered after October 30, 1996." *Singh*, 315 F.3d at 1188. The time limit is "mandatory and jurisdictional" and "not subject to equitable tolling." *Stone v. INS*, 514 U.S. 386, 405 (1995); *see also Martinez-Serrano v. INS*, 94 F.3d 1256, 1258 (9th Cir. 1996); *Caruncho v. INS*, 68 F.3d 356, 359–60 (9th Cir. 1995). The filing of a motion to reopen or reconsider does not toll the statutory time in which to appeal the underlying final order. *See Martinez-Serrano*, 94 F.3d at 1258.

The time limit for filing a petition for review begins to run when the BIA mails its decision, which is presumed to be the date indicated on the cover letter to the decision. *See Haroutunian v. INS*, 87 F.3d 374, 375 (9th Cir. 1996). The three-day grace period of Fed. R. App. P. 26(c) does not apply. *See id*. at 377. The time limit does not begin to run until the BIA mails its decision to the correct address. *See Martinez-Serrano*, 94 F.3d at 1258–59; *cf. Singh v. INS*, 315 F.3d 1186, 1188–90 (9th Cir. 2003) (holding that the BIA properly mailed decision to the applicant's last known address where attorney never filed a notice of appearance).

A petition for review is "filed" when it is received by the court. *See Sheviakov v. INS*, 237 F.3d 1144, 1148 (9th Cir. 2001). For instance, where a petition is sent via express mail and received at the court's post office on the 30th day, the petition is timely even though it was not stamped by the Clerks's office until the following day. *Id.* If the petitioner is an inmate confined in an institution, the petition for review "is timely if deposited in the institution's internal mailing system on or before the last day for filing." Fed. R. App. P. 25(a)(2)(C).

2. Habeas Appeals

Section 106 of the REAL ID Act eliminated habeas review over final orders of exclusion, removal or deportation. *See* 8 U.S.C. § 1252(a)(2) (as amended). Effective May 11, 2005, the exclusive means of review for judicial review of such decisions is a petition for review filed with the appropriate court of appeals. Moreover, all such habeas petitions pending in the district courts on May 11, 2005 were transferred to this court and shall be treated as if they were filed pursuant to a petition for review under INA § 242, 8 U.S.C. § 1252. However, the time limitations for filing such petitions do not apply to such transferred cases. *See* REAL ID Act § 106(c), referring to 8 U.S.C. § 1252(b)(1).

The REAL ID Act did not address how to treat appeals of the denial of habeas relief already pending in this court upon enactment of the Act. This court has held, however, that such appeals will be treated as timely filed petitions for review. *See, e.g., Alvarez-Barajas v. Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005); *Cordes v. Gonzales*, 421 f.3d 889, 892 (9th Cir. 2005); *Martinez-Rosas v. Gonzales*, No. 04-36150, 2005 WL 2174477 at *2 (Sept. 9, 2005).

The REAL ID Act does not appear to have eliminated habeas review where a petitioner does not challenge or seek review of a final order of removal, deportation, or exclusion. *See Ali v. Gonzales*, 421 F.3d 795, 796 fn.1 (9th Cir. 2005) (order) (noting that the transfer provisions of the REAL ID Act do not apply where petitioner does not challenge a final order of removal).

An appeal from the district court's denial of a 28 U.S.C. § 2241 habeas corpus petition must be filed within 60 days. Fed. R. App. P. 4(a)(1)(B).

D. Venue

"The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings." 8 U.S.C. § 1252(b)(2); *see also* IIRIRA § 309(c)(4)(D). Before IIRIRA, the petitioner could file in the judicial circuit where she resided, or in "the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part." *See* 8 U.S.C. § 1105a(a)(2) (repealed 1996).

E. Stay Issues

1. No Automatic Stay of Removal Pending Review

"Service of the petition [for review] does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise." 8 U.S.C. § 1252(b)(3)(B); *see also* IIRIRA § 309(c)(4)(F); *cf.* 8 U.S.C. § 1105a(a)(3) (repealed 1996) (providing for automatic stay of deportation in most cases upon service of the petition for review). Under *De Leon v. INS*, 115 F.3d 643, 644 (9th Cir. 1997), "[t]he filing of a motion for stay or a request for a stay contained in a petition for review will stay a petitioner's deportation temporarily until the court rules on the stay motion." *See also* Ninth Circuit General Order 6.4(c) (setting forth procedures for stays of deportation or removal).

The preliminary injunction standard applies to stay requests. *See Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998). The petitioner must demonstrate "either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor." *Id.* "These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point on the continuum a stay pending review is justified." *Id.*

In the Ninth Circuit, the *Abbassi* standard applies to stay requests under the IIRIRA permanent rules. *See Andrieu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001) (en banc) (holding that the heightened standard of 8 U.S.C. § 1252(f)(2) applies only to injunctions, not to stays of removal); *but see Kenyeres v. Ashcroft*, 538 U.S. 1301, 1303–04 (2003) (Kennedy J., in Chambers) (noting circuit split regarding the evidentiary standard applicable to a request for a stay pending review). The preliminary injunction standard also applies to requests for a stay pending review of the denial of a habeas petition under 28 U.S.C. § 2241. *See Maharaj v. Ashcroft*, 295 F.3d 963, 966 (9th Cir. 2002).

The stay of removal remains in place until the court issues its mandate. *See Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 856 (9th Cir. 2004).

2. Voluntary Departure Stays

The court lacks jurisdiction to review a denial of voluntary departure. *See Gomez-Lopez v. Ashcroft*, 393 F.3d 882, 883–84 (9th Cir. 2005); *Alvarez-Santos v. INS*, 332 F.3d 1245, 1255 (9th Cir. 2003); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1130 (9th Cir. 1998); *see also* 8 U.S.C. § 1229c(f) ("No court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure . . . nor shall any court order a stay of an alien's removal pending consideration of any claim with respect to voluntary departure."). However, the court has equitable jurisdiction to grant a timely request for a stay of the voluntary departure period. *See El Himri v. Ashcroft*, 344 F.3d 1261, 1262 (9th Cir. 2003) (order). The same preliminary injunction standard for obtaining a stay of removal applies to a request for a stay of voluntary departure. *Id.* "As a procedural matter, . . . this court shall temporarily stay the voluntary departure period pending determination of a motion for stay of voluntary departure, according to the same procedures presently in place for motions for stay of removal." *Id*. at 1263 n.1 (citing *De Leon v. INS*, 115 F.3d 643 (9th Cir. 1997) (order) and Ninth Circuit General Order 6.4(c)).

Under the transitional rules, the voluntary departure period does not begin to run until this court issues its mandate, and a request to stay the voluntary departure period is not necessary. *See Elian v. Ashcroft*, 370 F.3d 897, 901 (9th Cir. 2004) (order) (denying motion to stay voluntary departure period as moot).
Note that the Ninth Circuit has not yet addressed whether section 106(d) of the REAL ID Act (directing that petitions for review filed under the transitional rules shall be treated as if filed under the permanent rules of 8 U.S.C. § 1252) affects the running of the voluntary departure period in transitional rules cases.

Under the permanent rules, the voluntary departure period begins to run when the BIA renders its decision. *See Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1172–74 (9th Cir. 2003) (announcing that *Contreras-Aragon*, 852 F.2d 1088 (9th Cir. 1988) (en banc), which held that the voluntary departure period was automatically stayed during the pendency of the petition for review, is no longer the law of the circuit after IIRIRA).

This court construes a motion for a stay of removal filed before expiration of the voluntary departure period as including a timely motion to stay voluntary

departure. *See Desta v. Ashcroft*, 365 F.3d 741, 749–50 (9th Cir. 2004) (denying as unnecessary subsequent untimely motion to stay voluntary departure period).

The court has no jurisdiction to grant a request to stay voluntary departure that has been filed after the expiration of the voluntary departure period. *See Garcia v. Ashcroft*, 368 F.3d 1157, 1159–60 (9th Cir. 2004) (order) (declining to reach the question of whether petitioners properly relied on *Contreras-Aragon*, because the issue was not yet ripe for consideration). Where the voluntary departure period expires on a weekend, and the petitioner files a timely petition for review and motion to stay removal on the next court day, the motion to stay voluntary departure is timely under Fed. R. App. P. 26(a). *See Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 965 (9th Cir. 2004).

3. Stay of the Court's Mandate

The court may, upon denial of a petition for review, stay its mandate to allow the petitioner to seek additional relief. *See, e.g., Belishta v. Ashcroft*, 378 F.3d 1078, 1079 (9th Cir. 2004) (order) (staying mandate to allow the BIA an opportunity to reopen the case to consider in the first instance whether petitioner is entitled to asylum relief under 8 C.F.R. § 1208.13(b)(1)(iii)(B), based on her fear of "other serious harm upon removal"); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1143 (9th Cir. 2000) (staying mandate to allow time to file habeas corpus petition in district court); *Khourassany v. INS*, 208 F.3d 1096, 1101 (9th Cir. 2000) (staying mandate to allow petitioner to move to reopen under the Convention Against Torture); *Ortiz v. INS*, 179 F.3d 1148, 1152 (9th Cir. 1999) (staying mandate to allow petitioners to file motion to reopen for relief under the Nicaraguan Adjustment and Central American Relief Act ("NACARA")); *Ardon-Matute v. INS*, 157 F.3d 696, 697 (9th Cir. 1998) (per curiam) (staying proceedings to allow the BIA to adjudicate petitioners' motion to reopen to apply for relief under NACARA); *Aguilar-Escobar v. INS*, 136 F.3d 1240, 1241 (9th Cir. 1998) (staying mandate to allow petitioner to apply for relief under NACARA); *Echeverria-Hernandez v. INS*, 946 F.2d 1481, 1482 (9th Cir. 1991) (en banc) (withholding mandate until the termination of administrative proceedings pursuant to the *American Baptist Churches* settlement agreement); *Roque-Carranza v. INS*, 778 F.2d 1373, 1374 (9th Cir. 1984) (60-day stay to allow petitioner to move to reopen to present IAC claim); *cf. Valderrama v. INS*, 260 F.3d 1083, 1086 (9th Cir. 2001) (declining to stay the mandate).

F. Exhaustion

This court may review a final order of removal only if "the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1); *see also* 8 U.S.C. § 1105a(c) (repealed 1996). The petitioner's failure to raise an issue to the BIA constitutes a failure to exhaust, depriving this court of jurisdiction. *See Vargas v. INS*, 831 F.2d 906, 907–08 (9th Cir. 1987); *Barron v. Ashcroft*, 358 F.3d 674, 677 (9th Cir. 2004) (holding that the court lacks subject-matter jurisdiction over legal claims not presented in administrative proceedings below). A general challenge to the IJ's decision is insufficient, and the petitioner must specify the issues appealed. *See Zara v. Ashcroft*, 383 F.3d 927, 930 (9th Cir. 2004).

Where the petitioner makes reference to an issue or claim in his brief or notice of appeal to the BIA, the claim has been exhausted. *See, e.g., Zhang v. Ashcroft*, 388 F.3d 713, 721 (9th Cir. 2004) (per curiam) (holding that petitioner exhausted CAT claim by "explicitly mention[ing] in his brief to the BIA that he was requesting reversal of the IJ's denial of relief under the Convention Against Torture"); *Ladha v. INS*, 215 F.3d 889, 903 (9th Cir. 2000) (holding that petitioners exhausted claim by raising it in their notice of appeal, even though it was not discussed in the briefs before the BIA); *Urbina-Osejo v. INS*, 124 F.3d 1314, 1317 (9th Cir. 1997) (finding exhaustion where petitioner raised claim in her declaration). *Cf. Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004) (no jurisdiction to review withholding of removal claim because petitioner did not raise claim in brief to the BIA); *Barron v. Ashcroft*, 358 F.3d 674, 676 (9th Cir. 2004) (finding failure to exhaust where appeal "nowhere mention[ed]" petitioner's newly-raised due process challenge).

Claims may be exhausted even if the petitioner did not use the precise legal language. *See, e.g., Thomas v. Gonzales*, 409 F.3d 1177, 1183 (9th Cir. 2005) (en banc) (holding that petitioner exhausted her family as a social group claim where she checked the membership in a social group box in her asylum application, she asserted in a written declaration attached to her asylum application that she was targeted on the basis of a familial relationship, and her BIA appeal incorporated by reference that declaration)*; Ladha*, 215 F.3d at 901 n.13 (finding exhaustion of political persecution claim even though petitioners did not use the exact phrase in brief to BIA); *Agyeman v. INS*, 296 F.3d 871, 877–78 (9th Cir. 2002) (finding

exhaustion where pro se applicant "inartfully" raised due process claim and did not use "the exact legalese"); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1183–84 (9th Cir. 2001) (en banc) (holding that even though petitioner "never specifically invoked the phrase 'equitable tolling' in his briefs to the BIA, he sufficiently raised the issue before the BIA to permit us to review the issue on appeal"); *Cruz-Navarro v. INS*, 232 F.3d 1024, 1030, n.8 (9th Cir. 2000) (addressing imputed political opinion argument even though issue was argued in slightly different manner below).

Where the BIA has addressed an issue, the issue has been exhausted. *See Sagermark v. INS*, 767 F.2d 645, 648 (9th Cir. 1985); *Socop-Gonzalez*, 272 F.3d at 1186. "We do not require an alien to exhaust administrative remedies on legal issues based on events that occur *after* briefing to the BIA has been completed." *Alcaraz v. INS*, 384 F.3d 1150, 1158 (9th Cir. 2004) (holding that petitioners exhausted administrative remedies regarding their repapering argument because the INS's repapering policies were issued after briefing before the BIA). However, the IJ's or BIA's failure to address a properly raised issue does not render that issue unexhausted. *See Thomas v. Gonzales*, 409 F.3d 1177, 1184 (9th Cir. 2005) (en banc).

A petitioner is required to exhaust all claims before the BIA, even where the BIA issues a streamlined decision. *See Zara v. Ashcroft*, 383 F.3d 927, 931 (9th Cir. 2004).

1. Exceptions to Exhaustion

a. Constitutional Challenges

"An exception to the exhaustion requirement has been carved for constitutional challenges to the Immigration and Naturalization Act and INS procedures." *Rashtabadi v. INS*, 23 F.3d 1562, 1567 (9th Cir. 1994); *see also Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1273–74 (9th Cir. 1996) (holding "that the exhaustion doctrine does not bar review of a question concerning the validity of an INS regulation because of conflict with a statute"); *Garberding v. INS*, 30 F.3d 1187, 1188 n.1 (9th Cir. 1994) (considering equal protection claim raised for the first time on appeal); *Bagues-Valles v. INS*, 779 F.2d 483, 484 (9th Cir. 1985) (considering two due process claims not raised below).

"Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the BIA cannot give relief on such claims." *Garcia-Ramirez v. Gonzales*, No. 02-73546, 2005 WL 2045773, at *2 (9th Cir. Aug. 26, 2005) (per curiam).

However, "a petitioner cannot obtain review of procedural errors in the administrative process that were not raised before the agency merely by alleging that every such error violates due process." *Vargas v. INS*, 831 F.2d 906, 908 (9th Cir. 1987) (noting that "'[d]ue process' is not a talismanic term which guarantees review in this court of procedural errors correctable by the administrative tribunal"). "The key is to distinguish the procedural errors, constitutional or otherwise, that are correctable by the administrative tribunal from those that lie outside the BIA's ken." *Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995); *see also Barron v. Ashcroft*, 358 F.3d 674, 676, 678 (9th Cir. 2004) (requiring exhaustion of due process claims that petitioners were denied opportunity to speak and that attorney was absent); *Sanchez-Cruz v. INS*, 255 F.3d 775, 780 (9th Cir. 2001) (holding that petitioner was required to exhaust due process claim based on allegation of IJ bias).

b. Futility and Remedies "Available . . . As of Right"

Under the statute, an alien must exhaust "all administrative remedies *available* to the alien *as of right*." 8 U.S.C. § 1252(d)(1) (emphasis added). "Some issues may be so entirely foreclosed by prior BIA case law that no remedies are 'available . . . as of right' with regard to them before IJs and the BIA. The realm of such issues, however, cannot be broader than that encompassed by the futility exception to prudential exhaustion requirements." *Sun v. Ashcroft*, 370 F.3d 932, 942–43 (9th Cir. 2004) ("us[ing] the futility cases as a guide to the interpretation of the 'available . . . as of right' requirement"); *see also El Rescate Legal Servs., Inc. v. EOIR*, 959 F.2d 742, 747 (9th Cir. 1992) (holding, in the context of non-statutory or prudential exhaustion, that "where the agency's position on the question at issue 'appears already set,' and it is 'very likely' what the result of recourse to administrative remedies would be, such recourse would be futile and is not required").

"[M]otions to reconsider, like motions to reopen, are not 'remedies available . . . as of right' within the meaning of 8 U.S.C. § 1252(d)(1)." *Noriega-Lopez v. Ashcroft*,

335 F.3d 874, 881 (9th Cir. 2003) (rejecting the INS's contention that habeas petitioner was obliged to file a motion to reopen or reconsider before seeking review of the BIA's order of removal).

c. Nationality Claims

The exhaustion requirement of 8 U.S.C. § 1252(d)(1) does not apply to nationality claims brought under 8 U.S.C. § 1252(b)(5). *Theagene v. Gonzales*, 411 F.3d 1107, 1111 (9th Cir. 2005).

G. Departure from the United States

1. Review of Removal Orders

Under the permanent rules, applicable to individuals in removal proceedings, departure from the United States does not terminate jurisdiction. *See* 8 U.S.C. § 1252(a); *Mariscal-Sandoval v. Ashcroft*, 370 F.3d 851, 857 (9th Cir. 2004) (Beezer, J., concurring).

Under 8 U.S.C. § 1105a(c), the court generally lacks jurisdiction to review a deportation order if the alien departs from the United States after the order has been issued. *See id.* ("An order of deportation or of exclusion shall not be reviewed by any court if the alien . . . has departed from the United States after the issuance of the order."); *see also Stone v. INS*, 514 U.S. 386, 399 (1995) ("Once an alien has been deported, the courts lack jurisdiction to review the deportation order's validity."); *Kon v. Gonzales*, 400 F.3d 1225, 1226 (9th Cir. 2005) (per curiam); *Hajnal v. INS*, 980 F.2d 1247, 1247 (9th Cir. 1992) (per curiam). However, "[u]nder the *Mendez* exception, an alien outside the United States may petition for review of his deportation order when his departure was not 'legally executed.'" *Zepeda-Melendez v. INS*, 741 F.2d 285, 288, 290 (9th Cir. 1984) (holding "that deportation of an alien without notice to his counsel is not a legally executed departure within the meaning of 8 U.S.C. § 1105a(c), and does not strip the court of jurisdiction to review the deportation order whether or not the alien was in custody at the time of deportation"); *see also Wiedersperg v. INS*, 896 F.2d 1179, 1181–82 (9th Cir. 1990) (holding that a deportation based on a vacated conviction was not legally executed).

Cases falling under the transitional rules face a potentially anomalous situation because the court loses jurisdiction once the petitioner departs, *see* 8 U.S.C. § 1105a(c), and the filing of a petition for review no longer results in an automatic stay of deportation, *see* IIRIRA § 309(c)(4)(F). Note that the Ninth Circuit has not yet addressed whether section 106(d) of the REAL ID Act (directing that petitions for review filed under the transitional rules shall be treated as if filed under the permanent rules of 8 U.S.C. § 1252) altered the jurisdictional consequences of a petitioner's departure from the United States while a petition for review in a transitional rules case is pending before this court.

2. Review of Motions to Reopen

"Any departure from the United States, including the deportation or removal of a person who is the subject of exclusion, deportation, or removal proceedings, occurring after the filing of a motion to reopen or a motion to reconsider, shall constitute a withdrawal of such motion." 8 C.F.R. § 1003.2(d); *cf. Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990) (holding that petitioner was entitled to reopen his deportation proceedings after deportation where his state conviction, which was the sole ground of deportation, was vacated).

"A motion to reopen or reconsider shall not be made by or on behalf of a person who is the subject of exclusion, deportation, or removal proceedings subsequent to his or her departure from the United States." 8 C.F.R. § 1003.2(d); *Singh v. Gonzales*, 412 F.3d 1117, 1120 (9th Cir. 2005). "[T]he scope of this regulation is clearly limited to persons who depart the U.S. *after removal proceedings* have already commenced against them." *Singh*, 412 F.3d at 1121 (holding that the regulation does not apply to a petitioner who first departs the U.S., then becomes subject to removal proceedings, returns, and files a motion to reopen) (emphasis in original).

H. Fugitive Disentitlement Doctrine

A petitioner who fails to report for deportation or who fails to keep the courts apprised of his or her current address may have a petition for review dismissed under the fugitive disentitlement doctrine. The court has explained: "Although an alien who fails to surrender to the INS despite a lawful order of deportation is not, strictly speaking, a fugitive in a criminal matter, we think that he

is nonetheless a fugitive from justice. Like the fugitive in a criminal matter, the alien who is a fugitive from a deportation order should ordinarily be barred by his fugitive status from calling upon the resources of the court to determine his claims." *Zapon v. Dep't of Justice*, 53 F.3d 283, 285 (9th Cir. 1995); *see also Armentero v. INS*, 412 F.3d 1088 (9th Cir. 2005) (order) (dismissing petition for review because petitioner was a fugitive from custody); *Antonio-Martinez v. INS*, 317 F.3d 1089, 1091-93 (9th Cir. 2003) (applying the fugitive disentitlement doctrine where petitioner had lost contact with his attorney and the agency and all efforts to contact him failed for over two years); *cf. Bhasin v. Gonzales*, No. 03-73481, 2005 WL 2100447, at *7-8 (9th Cir. Sept. 1, 2005) (declining to uphold the BIA's reliance on the fugitive disentitlement doctrine in denying petitioner's motion to reopen because petitioner failed to receive critical documents pertaining to his order of removal).

The court has stated that the fugitive disentitlement doctrine is a "severe sanction that we do not lightly impose." *Bhasin v. Gonzales*, No. 03-73481, 2005 WL 2100447, at *8 (9th Cir. Sept. 1, 2005) (internal quotation omitted).

I. Proper Respondent

The proper respondent in a petition for review is the Attorney General. 8 U.S.C. § 1252(b)(3)(A). The Ninth Circuit has not yet determined whether the proper respondent in an immigration habeas petition under 28 U.S.C. § 2241 is the Attorney General, the Secretary of the Department of Homeland Security, or the immediate custodian. *See Armentero v. INS*, 340 F.3d 1058 (9th Cir. 2003) (holding that the Secretary of the Department of Homeland Security and the Attorney General were the proper respondents), *withdrawn*, 382 F.3d 1153 (9th Cir. 2004) (order); *see also Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2718 n.8 (2004) (declining to resolve whether the Attorney General is a proper respondent in an immigration habeas petition).

J. Reorganization of the Immigration and Naturalization Service

The INS was abolished on March 1, 2003 pursuant to the Homeland Security Act of 2002. *See Hernandez v. Ashcroft*, 345 F.3d 824, 828 n.2 (9th Cir. 2003). Immigration functions were transferred to the following agencies within the newly-created Department of Homeland Security ("DHS"):

1. U.S. Immigration and Customs Enforcement ("ICE"), responsible for alien removal and detention.
2. U.S. Citizenship and Immigration Services ("USCIS"), responsible for immigration services such as naturalization, asylum, refugee processing, and adjustment of status.
3. U.S. Customs and Border Protection ("CBP"), responsible for border patrol.

K. Reorganization of Administrative Regulations

The administrative regulations governing immigration proceedings have been recodified at 8 C.F.R. § 1003 et seq., to reflect the transfer of INS functions to the DHS. *See* 68 Fed. Reg. 9824 (Feb. 28, 2003) (Add 1000 to the old regulation cite to find the current regulatory cite). The Executive Office for Immigration Review ("EOIR"), including the Board of Immigration Appeals and the Immigration Judges, remain under the Department of Justice. *Id.*

L. Exclusion Orders

Before IIRIRA, aliens who had not made an "entry" into the United States were placed in exclusion proceedings. *See Hose v. INS*, 180 F.3d 992, 994 (9th Cir. 1999) (en banc). "Under pre-IIRIRA law, the appropriate avenue for judicial review of a final order of exclusion was for the alien to file a petition for a writ of habeas corpus in the district court." *Id.*; *see also* 8 U.S.C. § 1105a(b) (repealed) ("any alien against whom a final order of exclusion has been made . . . may obtain judicial review of such order by habeas corpus proceedings and not otherwise").

The IIRIRA permanent rules established a unified "removal" proceeding, and eliminated the different jurisdictional tracks for deportation and exclusion orders. *See Hose*, 180 F.3d at 994 & n.1. The IIRIRA transitional rules redirected review of exclusion orders from the district courts to the courts of appeal. *See id.* (citing IIRIRA § 309(c)(4)(A)).

IV. LIMITATIONS ON JUDICIAL REVIEW OF DISCRETIONARY DECISIONS

The IIRIRA permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, bar review of certain discretionary decisions. 8 U.S.C. § 1252(a)(2)(B) states:

> Denials of discretionary relief
>
> Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review–
>
> (i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or
> (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

However, the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) amended the INA by adding 8 U.S.C. § 1252(a)(2)(D), which states:

> Judicial review of certain legal claims
>
> Nothing in subparagraph (B) . . . or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Thus, notwithstanding any limitations on judicial review set forth in 8 U.S.C. § 1252(a)(2)(B), this court has jurisdiction to consider questions of law and constitutional questions raised in a petition for review challenging the agency's discretionary denial of relief. "In short, Congress repealed all jurisdictional bars to

our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) . . .) following the amendment of that section by the REAL ID Act." *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending).

The Ninth Circuit has developed a considerable body of caselaw addressing the scope of its jurisdiction under 8 U.S.C. § 1252(a)(2)(B). However, it is unclear to what extent this precedent is still applicable in light of the expanded scope of review set forth in 8 U.S.C. § 1252(a)(2)(D). Thus far, the court has issued two decisions specifically addressing its jurisdiction to review constitutional questions and questions of law in the context of a discretionary denial of relief. *See Cabrera-Alvarez v. Gonzales*, No. 04-72487, 2005 WL 2159038 (Sept. 8, 2005); *Martinez-Rosas v. Gonzales*, No. 04-36150, 2005 WL 2174477 (Sept. 9, 2005).

A. Definition of Discretionary Decision

The Immigration and Nationality Act does not define what constitutes a discretionary decision. *See Hernandez v. Ashcroft*, 345 F.3d 824, 833 (9th Cir. 2003). This court has held that "determinations that require application of law to factual determinations are nondiscretionary." *Id.* at 833–34 (internal quotation marks and alteration omitted). On the other hand, "an inquiry is discretionary where it is a subjective question that depends on the value judgment of the person or entity examining the issue." *Romero-Torres v. Ashcroft*, 327 F.3d 887, 891 (9th Cir. 2003) (internal quotation marks omitted) (holding that the court lacks jurisdiction to review the BIA's exceptional and extremely unusual hardship determination).

"When the BIA acts where it has no legal authority to do so, it does not make a discretionary decision, and such a determination is not protected from judicial review." *Hernandez*, 345 F.3d at 847 (internal citations omitted) (holding that because BIA's decision to deny adjustment based on non-viability of the marriage was contrary to law, it was not discretionary, and therefore subject to review); *see also Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 689 (9th Cir. 2003) ("Even if a statute gives the Attorney General discretion, . . . the courts retain jurisdiction to review whether a particular decision is *ultra vires* the statute in question.").

B. Enumerated Discretionary Decisions

1. Subsection (i)–Permanent Rules

Subsection (i) of section 1252(a)(2)(B) of the permanent rules lists the following forms of discretionary relief:

8 U.S.C. § 1182(h)	Section 212(h) Criminal Inadmissibility Waiver
8 U.S.C. § 1182(i)	Section 212(i) Fraud or Misrepresentation Waiver
8 U.S.C. § 1229b	Cancellation of Removal
8 U.S.C. § 1229c	Voluntary Departure
8 U.S.C. § 1255	Adjustment of Status

2. Transitional Rules

Section 309(c)(4)(E) of the IIRIRA transitional rules contains a similar limitation on direct judicial review of discretionary decisions, stating that: "there shall be no appeal of any discretionary decision under § 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act)"

Section 309(c)(4)(E) refers to the following forms of discretionary relief:

Section 212(c)	Discretionary Waiver for long-time permanent residents
Section 212(h)	Criminal Inadmissibility Waiver
Section 212(i)	Fraud or Misrepresentation Waiver
Section 244	Suspension of deportation
Section 245	Adjustment of Status

Note that the REAL ID Act provides that a petition for review filed under IIRIRA's transitional rules shall be treated as a petition for review filed under the permanent provisions of 8 U.S.C. § 1252. *See* REAL ID Act § 106(d) (uncodified).

C. Judicial Review Remains Over Non-Discretionary Determinations

The limitation on judicial review of discretionary decisions applies only to those decisions involving the exercise of discretion. *See Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1144 (9th Cir. 2002) (holding that section 1252(a)(2)(B)(i) "eliminates jurisdiction only over decisions by the BIA that involve the exercise of discretion"). Accordingly, the court retains jurisdiction over non-discretionary questions, such as whether the applicant satisfied the continuous physical presence requirement, and whether an adult daughter qualifies as a child. *Id*. at 1144–45 (holding that court retained jurisdiction to review the purely legal question of whether the applicant's adult daughter qualified as a "child" for purposes of cancellation of removal).

See also Gomez-Lopez v. Ashcroft, 393 F.3d 882, 884 (9th Cir. 2005) (retaining jurisdiction over IJ's non-discretionary determination that cancellation applicant lacked good moral character based on incarceration in county jail); *Lagandaon v. Ashcroft*, 383 F.3d 983, 986–87 (9th Cir. 2004) (retaining jurisdiction over statutory question of whether cancellation applicant accrued ten years of physical presence before service of notice to appear); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 788 (9th Cir. 2004) (retaining jurisdiction over BIA's "purely legal, rather than discretionary," denial of a Form I-212 waiver); *Hernandez v. Ashcroft*, 345 F.3d 824, 833–35 (9th Cir. 2003) (holding that court retained jurisdiction over non-discretionary determination that VAWA petitioner suffered "extreme cruelty"); *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (holding that the court retained jurisdiction to consider whether applicant was eligible for suspension under the petty offense exception); *Murillo-Salmeron v. INS*, 327 F.3d 898, 901(9th Cir. 2003) (holding that the court retained jurisdiction to review whether petitioner's DUI conviction rendered him inadmissible, thus requiring a § 212(h) waiver of inadmissibility); *Molina-Estrada v. INS*, 293 F.3d 1089, 1093–94 (9th Cir. 2002) (holding that the court retained jurisdiction to review whether applicant's mother was a lawful permanent resident); *Dillingham v. INS*, 267 F.3d 996, 1003 (9th Cir. 2001) (stating that the court retained jurisdiction over the BIA's determination that applicant was statutorily ineligible for adjustment of status); *Pondoc Hernaez v. INS*, 244 F.3d 752, 758 (9th Cir. 2001) (retaining jurisdiction under transitional rules to review continuous physical presence); *Kalaw v. INS*, 133 F.3d 1147, 1151 (9th Cir. 1997) (holding under transitional rules that the court retained jurisdiction over the

continuous physical presence inquiry and certain statutory moral character determinations); *cf. Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (holding that petitioner's contention that the BIA committed a legal error by misapplying the case law in determining extreme hardship did not make the determination non-discretionary).

The court of appeals also retains "jurisdiction to review whether the BIA applied the correct discretionary waiver standard in the first instance." *Murillo-Salmeron v. INS*, 327 F.3d 898, 901 (9th Cir. 2003) (holding that section 309(c)(4)(E) did not divest the court of jurisdiction where the BIA purported to affirm a discretionary decision that the IJ did not make) (internal quotation marks omitted); *see also Cervantes-Gonzales v. INS*, 244 F.3d 1001, 1005 (9th Cir. 2001) (holding that the court retained jurisdiction to review whether BIA applied the correct standard for determining eligibility for a section 212(i) waiver of inadmissibility).

D. Jurisdictional Bar Limited to Statutory Eligibility Requirements

This court has "interpreted section 309(c)(4)(E) to pertain to the statutory eligibility requirements found in INA § 244(a)(1) and to the ultimate discretionary decision whether to grant the suspension based on the merits of the case." *Castillo-Perez v. INS*, 212 F.3d 518, 524 (9th Cir. 2000). An IJ's decision to deem an application for suspension to be abandoned, and the BIA's decision to dismiss a claim of ineffective assistance of counsel are not discretionary decisions under section 244 of the INA, and the court retains jurisdiction over these claims. *Id*. (remanding for application of the law as it existed at the time of applicant's original hearing).

E. Jurisdiction Over Constitutional Issues and Questions of Law

Even before enactment of the REAL ID Act of 2005, this court held that it retained petition-for-review jurisdiction to review constitutional claims raised in a petition for review of a discretionary decision. *See, e.g., Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003) (retaining jurisdiction to consider whether the BIA's interpretation of the exceptional and extremely unusual hardship standard violates due process); *Tovar-Landin v. Ashcroft*, 361 F.3d 1164, 1166 (9th Cir. 2004) (retaining jurisdiction over due process and equal protection challenges

to voluntary departure regime); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (retaining jurisdiction on petition for review of denial of cancellation to review due process challenge to streamlining procedure); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003) (retaining jurisdiction in suspension case to review due process challenge based on IJ bias); *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003) (retaining jurisdiction on petition for review of denial of cancellation, to review applicant's due process, ineffective assistance of counsel, and equitable tolling claims); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105 (9th Cir. 2003) (retaining jurisdiction over due process claim); *Ramirez-Alejandre v. Ashcroft*, 319 F.3d 365, 377 (9th Cir. 2003) (en banc) (retaining jurisdiction to review due process challenge to the BIA's refusal to allow suspension applicant to supplement the record); *Agyeman v. INS*, 296 F.3d 871, 876 (9th Cir. 2002) (retaining jurisdiction over suspension applicant's due process claim); *Sanchez-Cruz v. INS*, 255 F.3d 775, 779–80 (9th Cir. 2001) (holding that the court would retain jurisdiction over allegations of IJ bias, but that applicant failed to exhaust her due process claim before the BIA); *Larita-Martinez v. INS*, 220 F.3d 1092, 1095 (9th Cir. 2000) (retaining jurisdiction and rejecting due process claim that the BIA failed to review all relevant evidence submitted in suspension case); *Antonio-Cruz v. INS*, 147 F.3d 1129, 1131 (9th Cir. 1998) (retaining jurisdiction in voluntary departure case over due process claim based on IJ's "harsh manner and tone").

The REAL ID Act of 2005 amended the INA to make explicit that the court retains jurisdiction to consider both constitutional questions and questions of law raised in a petition for review of a discretionary decision. *See* 8 U.S.C. § 1252(a)(2)(D); *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending). The Ninth Circuit has thus far issued two decisions interpreting the scope of this court's jurisdiction under 8 U.S.C. § 1252(a)(2)(D) in the context of a discretionary determination.

In *Cabrera-Alvarez v. Gonzales*, No. 04-72487, 2005 WL 2159038, at *3 fn.1 (Sept. 8, 2005) (mandate pending), the court held that it has jurisdiction to consider whether the agency's interpretation of the hardship standard under 8 U.S.C. § 1229b(b)(1)(D) is inconsistent with international law. The court explained: "Before the REAL ID Act took effect, our jurisdiction over petitions for review of the agency's discretionary application of the hardship requirement of 8 U.S.C. § 1229b(b)(1) was limited to consideration of 'whether the BIA's

interpretation of the hardship standard violates due process.'" *Cabrera-Alvarez*, 2005 WL 2159038, at *3 fn.1 (citing *Ramirez-Perez v. Ashcroft*, 336 F.3d 1001, 1004 (9th Cir. 2003). The court further explained: "Now that our jurisdiction over legal questions has been expanded, Petitioner's argument need not be so constrained as that of the petitioner in *Ramirez-Perez*, who was required to show that the agency's 'interpretation of the hardship standard contradicts congressional intent to such a degree that it violates [Petitioner's] due process rights.'" *Id*.

In *Martinez-Rosas v. Gonzales*, the court held that petitioner's contention that the agency denied her due process by misapplying the applicable law to the facts of her case was not colorable and therefore did not confer jurisdiction over the agency's discretionary hardship determination. *See Martinez-Rosas v. Gonzales*, No. 04-36150, 2005 WL 2174477, at *3 (Sept. 9, 2005) (mandate pending) (citing *Torres-Aguilar v. INS*, 246 F.3d 1267, 1271 (9th Cir. 2001) ("To be colorable . . . the alleged violation need not be substantial, but the claim must have some possible validity.") (internal quotation marks and citation omitted).

F. Authorized and Specified Discretionary Decisions–Subsection (ii)

Under subsection (ii) of 8 U.S.C. § 1252(a)(2)(B),

> no court shall have jurisdiction to review . . . any other decision or action of the Attorney General the authority for which is specified under [8 U.S.C. §§ 1151–1378] to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title [relating to asylum].

Spencer Enterprises, Inc. v. United States, 345 F.3d 683, 688–89 (9th Cir. 2003) (quoting 8 U.S.C. § 1252(a)(2)(B)(ii), and holding that section did not bar jurisdiction over a challenge to the denial of an immigrant investor visa pursuant to 8 U.S.C. § 1153(b)(5)).

The *Spencer* court held that § 1252(a)(2)(B)(ii) does not bar review over all discretionary decisions, and only applies where the AG's discretionary authority is "specified" in the statute in question. *Spencer*, 345 F.3d at 689. More specifically, for subsection (ii) to apply, "the language of the statute in question must provide

the discretionary authority." *Id*.; *see also Matsuk v. INS*, 247 F.3d 999, 1002 (9th Cir. 2001) (holding that § 1252(a)(2)(B)(ii) bars review of the discretionary denial of withholding of removal based on an aggravated felony conviction resulting in a sentence of less than five years, because the statute allows the Attorney General to determine whether such a crime is "particularly serious" without statutory guidelines).

Moreover, the "authority" to act must be in the discretion of the Attorney General, meaning that "the right or power to act is entirely within his or her judgment or conscience." *Spencer*, 345 F.3d at 690. In order to bar review, the statute must give the Attorney General "pure discretion, rather than discretion guided by legal standards." *Id.* "In general terms, if a legal standard from an appropriate source governs the determination in question, that determination is reviewable for a clarification of that legal standard." *ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). More specifically, "if the statutory provision granting the Attorney General power to make a given decision also sets out specific standards governing that decision, the decision is not in the discretion of the Attorney General." *Id.* at 892 (internal quotation marks omitted). Although the court may not look to agency practice as a source for the relevant legal standards, the court may use judicial precedent in order to interpret the relevant statutory standards. *See id*. at 893.

In *Nakamoto v. Ashcroft*, 363 F.3d 874, 878 (9th Cir. 2004), the court held that it retained jurisdiction over the IJ's removal order based on marriage fraud under 8 U.S.C. § 1227(a)(1)(G)(ii) because "the determination of whether a petitioner committed marriage fraud is not a decision the authority for which is specified under the INA to be entirely discretionary." More specifically, when making a marriage fraud determination, "[t]he Attorney General must undertake an objective inquiry and refrain from imposing his or her own subjective values on the interpretation of facts[, and] *cannot* legally make a judgment solely according to the dictates of his or her conscience." *Id.* at 881.

In *Oropeza-Wong v. Gonzales*, 406 F.3d 1135, 1142 (9th Cir. 2005), the court held that determinations made with respect to statutory waivers under 8 U.S.C. § 1186a(c)(4) (pertaining to removal of the conditional basis of permanent resident status) are not purely discretionary and are therefore generally subject to review. The court further held that the statutory history of that section

"demonstrates unequivocally that Congress did not intend to strip courts of jurisdiction to review adverse credibility determinations in particular." *Id*.

See also Zadvydas v. Davis, 533 U.S. 678, 688 (2001) (holding that legal question regarding the extent of the Attorney General's authority under the post-removal-period detention statute was not a discretionary matter barred by § 1252(a)(2)(B)(ii)); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157-58 (9th Cir. 2005) (stating that the court would have jurisdiction to review the IJ's statutory denial of a section 237(a)(1)(H) waiver of removal, but would not have jurisdiction under subsection (ii) to review a discretionary denial of such waiver); *ANA Int'l Inc. v. Way*, 393 F.3d 886 (9th Cir. 2004) (holding that Attorney General's decision to revoke a visa under 8 U.S.C. § 1155 is not barred by subsection (ii) as a specified discretion decision); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528 (9th Cir. 2004) (holding that subsection (ii) did not bar jurisdiction over denial of a motion to reopen to adjust status); *Hernandez v. Ashcroft*, 345 F.3d 824, 833-34 (9th Cir. 2003) (holding that determination of whether an alien suffered "extreme cruelty" is a reviewable legal and factual determination).

Cf. Avendano-Ramirez v. Ashcroft, 364 F.3d 813, 819 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(ii) barred review of the applicant's claim that the IJ should have allowed her to withdraw her application for admission under 8 U.S.C. § 1225(a)(4), because that decision is committed by statute to the discretion of the Attorney General).

Pursuant to the REAL ID Act, it is now clear that section (ii) applies regardless of whether the "judgment, decision, or action is made in removal proceedings." 8 U.S.C. § 1252(a)(2)(B) (as amended by the REAL ID Act); *compare Spencer Enterprises, Inc. v. United States*, 345 F.3d 683, 692 (9th Cir. 2003) (noting circuit split over whether section (ii) applies outside the context of removal proceedings); *see also ANA Int'l Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (assuming, but not deciding, applicability of subsection (ii) to a visa revocation decision under 8 U.S.C. § 1155).

G. Asylum Relief

Although asylum is a discretionary form of relief, 8 U.S.C. § 1252(a)(2)(B)(ii) explicitly exempts asylum determinations from the jurisdictional bar over discretionary decisions. Several new restrictions on eligibility for asylum, however, are not subject to judicial review:

1. One-Year Bar

Under IIRIRA, effective April 1, 1997, an applicant must demonstrate by clear and convincing evidence that his or her asylum application was filed within one year after arrival in the United States. *See Hakeem v. INS*, 273 F.3d 812, 815 (9th Cir. 2001); 8 U.S.C. § 1158(a)(2)(B). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review an IJ's determination under this section. *Hakeem*, 273 F.3d at 815; *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004). The court also lacks jurisdiction over the BIA's determination that no extraordinary circumstances excused the untimely filing of the application. *Molina-Estrada*, 293 F.3d at 1093 (citing 8 U.S.C. § 1158(a)(3)).

This court is currently considering to what extent, if any, the REAL ID Act, including the Act's amendments to 8 U.S.C. § 1252(a)(2)(D) (restoring judicial review over legal and constitutional questions), may affect the judicial review bar contained in 8 U.S.C. § 1158(a)(3). *See, e.g.*, *Hay v. Ashcroft*, 04-70743 (arg. & sub. 8/12/05); *Ramadan v. Gonzales*, 03-74351 (arg. & sub. 8/12/05).

2. Previous-Denial Bar

An applicant who previously applied for and was denied asylum is barred from receiving a grant of asylum. *See* 8 U.S.C. § 1158(a)(2)(C). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review an IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

3. Safe Third Country Bar

An applicant has no right to apply for asylum if he or she "may be removed, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality . . .) in which the alien's life or freedom would not be threatened on account of" the statutory grounds. 8 U.S.C. § 1158(a)(2)(A). Pursuant to 8 U.S.C. § 1158(a)(3), this court lacks jurisdiction to review the IJ's determination under this section. Applicants who filed before April 1, 1997 are not barred under this section. *See* 8 C.F.R. § 1208.13(c)(1) and (2).

The DHS recently issued rules governing a bilateral agreement between the United States and Canada. *See* 69 FR 69480 (Nov. 29, 2004) ("Implementation of the Agreement Between the Government of the United States of America and the Government of Canada Regarding Asylum Claims Made in Transit and at Land Border Ports-of-Entry"). The applicable regulation is codified at 8 C.F.R. § 208.30(e)(6), and states:

> Prior to any determination concerning whether an alien arriving in the United States at a U.S.-Canada land border port-of-entry or in transit through the U.S. during removal by Canada has a credible fear of persecution or torture, the asylum officer shall conduct a threshold screening interview to determine whether such an alien is ineligible to apply for asylum pursuant to section 208(a)(2)(A) of the Act and subject to removal to Canada by operation of the Agreement Between the Government of the United States and the Government of Canada for Cooperation in the Examination of Refugee States Claims from Nationals of Third Countries ("Agreement"). In conducting this threshold screening interview, the asylum officer shall apply all relevant interview procedures outlined in paragraph (d) of this section, provided, however, that paragraph (d)(2) of this section shall not apply to aliens described in this paragraph. The asylum officer shall advise the alien of the Agreement's exceptions and question the alien as to applicability of any of these exceptions to the alien's case.

4. Terrorist Activity Bar

Pursuant to 8 U.S.C. § 1158(b)(2)(D), there shall be no judicial review of a determination of the Attorney General that an individual is ineligible for asylum based on terrorist activity under 8 U.S.C. § 1158(b)(2)(A)(v). *See Bellout v. Ashcroft*, 363 F.3d 975, 977 (9th Cir. 2004). Section 1158(b)(2)(A)(v) eliminates eligibility for asylum if:

> the alien is described in subclause (I), (II), (III), (IV), or (VI) of section 1182(a)(3)(B)(i) of this title or removable under section 1227(a)(4)(B) of this title (relating to terrorist activity), unless, in the case only of an alien described in subclause (IV) of section 1182(a)(3)(B)(i) of this title, the Attorney General determines, in the Attorney General's discretion, that there are not reasonable grounds for regarding the alien as a danger to the security of the United States.

Note that the REAL ID Act of 2005, Pub. L. 109-13, 119 Stat. 231, expanded the definition of terrorist organizations and terrorist related activities. *See* 8 U.S.C. § 1182(a)(3)(B) (as amended).

5. Standard of Review

Under the permanent rules, the Attorney General's discretionary judgment whether to grant asylum relief "shall be conclusive unless manifestly contrary to the law and an abuse of discretion." 8 U.S.C. § 1252(b)(4)(D). "Thus, when refugee status has been established, we review the Attorney General's grant or denial of asylum for abuse of discretion." *Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004).

V. LIMITATIONS ON JUDICIAL REVIEW BASED ON CRIMINAL OFFENSES

A. Judicial Review Framework Before Enactment of the REAL ID Act of 2005

Before enactment of the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005), there was limited direct appellate jurisdiction over final administrative orders against individuals found removable, deportable or excludable based on certain criminal offenses.

Section 440(a) of AEDPA, enacted on April 24, 1996, amended 8 U.S.C. § 1105a(a)(10) by repealing appellate jurisdiction over final orders of deportation against most criminal aliens. As amended, section 1105a(a)(10) provided that "[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section 241(a)(2) (A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i), shall not be subject to review by any court." AEDPA, Pub. L. No. 104–132, § 440(a) (as amended by IIRIRA section 306(d)). This court held that section 440(a) is constitutional, and that it applies retroactively to pending cases. *See Duldulao v. INS*, 90 F.3d 396, 399–400 (9th Cir. 1996).

"Section 1105a(a)(10) and many other provisions of the Immigration Act were superseded by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996." *Elramly v. INS*, 131 F.3d 1284, 1285 n.1 (9th Cir. 1997) (per curiam). Section 321 of IIRIRA amended the aggravated felony definition in 8 U.S.C. §§ 1101(a)(43)(F) and 1101(a)(43)(S) by increasing the number of crimes qualifying as aggravated felonies. The aggravated felony amendments apply to "actions taken" on or after the September 30, 1996 enactment of IIRIRA. *See Valderrama-Fonseca v. INS*, 116 F.3d 853, 856–57 (9th Cir. 1997) (holding that "actions taken" refers to administrative orders and decisions issued against the alien, and may include steps taken by the alien, but do not include acts of the courts); *cf. Park v. INS*, 252 F.3d 1018, 1025 (9th Cir. 2001) (holding that the aggravated felony amendments applied to actions taken on or after the enactment of IIRIRA).

IIRIRA's transitional rules, applicable to cases in which deportation proceedings were initiated before April 1, 1997, and the final agency order was entered on or after October 31, 1996, limited petition-for-review jurisdiction for individuals found deportable based on certain enumerated crimes.

IIRIRA section 309(c)(4)(G) provides:

> [T]here shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal

offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

The listed criminal offenses are:

Section 212(a)(2):	the criminal grounds of inadmissibility
Section 241(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer
Section 241(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
Section 241(a)(2)(B):	controlled substance convictions and drug abuse
Section 241(a)(2)(C):	certain firearm offenses
Section 241(a)(2)(D):	miscellaneous crimes

Likewise, IIRIRA's permanent rules, applicable to removal proceedings initiated on or after April 1, 1997, limited petition for review jurisdiction for individuals found removable based on certain enumerated crimes.

Section 1252(a)(2)(C) provides:

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who

> is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

The listed criminal offenses are:

8 U.S.C. § 1182(a)(2):	the criminal grounds of inadmissibility
8 U.S.C. § 1227(a)(2)(A)(i) & (ii):	two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, for which both crimes carry possible sentences of one year or longer
8 U.S.C. § 1227(a)(2)(A)(iii):	conviction of an aggravated felony at any time after admission
8 U.S.C. § 1227(a)(2)(B):	controlled substance convictions and drug abuse
8 U.S.C. § 1227(a)(2)(C):	certain firearm offenses
8 U.S.C. § 1227(a)(2)(D):	miscellaneous crimes

Despite these provisions limiting judicial review, the court held that it retained jurisdiction to determine it own jurisdiction. *Ye v. INS*, 241 F.3d 1128, 1131 (9th Cir. 2000). In other words, the court retained jurisdiction to address three threshold issues: "whether the petitioner is [1] an alien, [2] removable, and [3] removable because of a conviction for a qualifying crime." *Zavaleta-Gallegos v. INS*, 261 F.3d 951, 954 (9th Cir. 2001) (internal quotation marks, alteration, and emphasis omitted) (retaining jurisdiction to review whether petitioner was "removable").

The court explained that often "the jurisdictional question and the merits collapse into one." *Ye*, 214 F.3d at 1131. If the court determined that the applicant was removable based on a conviction of an enumerated crime, the court lacked direct judicial review over the petition for review. *See Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073 (9th Cir. 2001); *cf. Unuakhaulu v. Ashcroft*, 392 F.3d 1024 (9th Cir. 2004) (holding that the court lacks jurisdiction where a petitioner is found removable or ineligible for relief based on a conviction of an enumerated crime).

This elimination of direct review applied to constitutional and other claims. *See, e.g.*, *Cedano-Viera v. Ashcroft*, 324 F.3d 1062, 1064 (9th Cir. 2003) (no jurisdiction to review due process and equal protection claims on petition for review); *Flores-Miramontes v. INS*, 212 F.3d 1133, 1135–36 (9th Cir. 2000) (no jurisdiction to review "substantial constitutional" claims on petition for review); *Alfaro-Reyes v. INS*, 224 F.3d 916, 921–22 (9th Cir. 2000) (holding that "IIRIRA section 309(c)(4)(G) divests us of jurisdiction to hear constitutional claims on direct appeal"). The court held, however, that despite the elimination of direct review, such constitutional claims could be raised in habeas corpus proceedings. *Noriega-Lopez v. Ashcroft*, 335 F.3d 874, 878–79 (9th Cir. 2003); *see also INS v. St. Cyr*, 533 U.S. 289, 314 (2001) (holding that AEDPA and IIRIRA did not repeal habeas corpus jurisdiction to challenge the legal validity of a final order of deportation or removal); *Arreola-Arreola v. Ashcroft*, 383 F.3d 956, 964 (9th Cir. 2004) (same); *see also Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (holding, pre-*St. Cyr*, that neither AEDPA nor IIRIRA repealed the statutory habeas remedy under 28 U.S.C. § 2241).

B. Judicial Review Following Enactment of the REAL ID Act of 2005

Although the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005) did not repeal 8 U.S.C. § 1252(a)(2)(C), it added a new provision, § 1252(a)(2)(D), as follows:

> Judicial Review of Certain Legal Claims –
> Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or

> questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

In *Fernandez-Ruiz v. Gonzales*, 410 F.3d 585, 587 (9th Cir. 2005) (mandate pending), the Ninth Circuit interpreted § 1252(a)(2)(D) as repealing "all jurisdictional bars to our direct review of final removal orders other than those remaining in 8 U.S.C. § 1252 (in provisions other than (a)(2)(B) or (C)) following the amendment of that section by the REAL ID Act." Moreover, the court held that "Congress explicitly made the amendments restoring our jurisdiction retroactive," and that "§ 1252(a)(2)(D), as added by the REAL ID Act, applies to . . . all [] pending or future petitions for direct review challenging final orders of removal, except as may otherwise be provided in § 1252 itself." *Id*. (citing the REAL ID Act § 106(b)). *See also Parilla v. Gonzales*, 414 F.3d 1038, 1040 (9th Cir. 2005) (concluding that the court had jurisdiction to review the petition for review of an alien convicted of an aggravated felony); *Lisbey v. Gonzales*, 420 F.3d 930, 931 (9th Cir. 2005) (same); *but see Gattem v. Gonzales*, 412 F.3d 758, 762, 767 (7th Cir. 2005) (holding that even after enactment of the REAL ID Act courts of appeal lack jurisdiction to review a final order of removal of an alien found removable for committing an aggravated felony).

Although the REAL ID Act expanded the scope of direct judicial review over final orders of removal in cases involving certain criminal convictions, it also limited the forum in which a petitioner may seek judicial review over final administrative orders of removal, deportation and exclusion by eliminating habeas jurisdiction over such cases. *See* REAL ID Act, § 106(a) (amending 8 U.S.C. § 1252). A petition for review filed with the appropriate court of appeals is now the sole means of challenging a final agency order of removal, deportation or exclusion.

Finally, in addition to restoring direct judicial review and eliminating habeas jurisdiction over final orders of removal in cases involving certain criminal convictions, section 106(d) of the REAL ID Act directs that a petition for review filed in a deportation or exclusion case governed by the transitional rules "shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. § 1252) [IIRIRA's permanent rules]."

The Ninth Circuit has not yet addressed in a published opinion the implications of § 106(a) on petitions for review brought by individuals found deportable or excludable based on certain enumerated offenses. Pursuant to this provision, however, it appears that petitions for review in transitional rules cases, which were previously governed by IIRIRA section 309(c)(4)(G), are now governed by the judicial review provisions of 8 U.S.C. § 1252(a)(2)(C). Thus, the restoration of direct judicial review, including review over constitutional claims and legal questions, appears to apply equally to transitional rules and permanent rules cases.

VI. EXCLUSIVE JURISDICTION PROVISION–8 U.S.C. § 1252(g)

Section 242(g) of IIRIRA, 8 U.S.C. § 1252(g), provides:

> Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

"Section 1252(g) is not subject to IIRIRA's transitional rules; it applies without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under the Act." *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 599 (9th Cir. 2002) (citing IIRIRA § 306(c)(1)) (internal quotation marks omitted).

In *Reno v. American-Arab Anti-Discrimination Comm.*, the Supreme Court construed Section 1252(g) narrowly, holding that "[t]he provision applies only to three discrete actions that the Attorney General may take: her decision or action to *commence* proceedings, *adjudicate* cases, or *execute* removal orders." 525 U.S. 471, 482 (1999) (internal quotation marks omitted). The Court held that it lacked jurisdiction over the aliens' selective enforcement claims because these claims fell squarely within the prohibition on review of the Attorney's General's decision to "commence proceedings." *Id.* at 486.

See also Alcaraz v. INS, 384 F.3d 1150, 1161 (9th Cir. 2004) (holding that § 1252(g) did not bar jurisdiction over petitioners' repapering claim); *Wong v. United States*, 373 F.3d 952, 965 (9th Cir. 2004) (holding that § 1252(g) did not "bar review of the actions that occurred *prior* to any decision to 'commence proceedings,' if any, against her or to execute the removal order, such as the INS officials' allegedly discriminatory decisions regarding advance parole, adjustment of status, and revocation of parole"); *United States v. Hovsepian*, 359 F.3d 1144, 1155 (9th Cir. 2004) (en banc) (holding that § 1252(g) did not bar district court's injunction requiring the INS to treat criminal alien under the immigration law as it existed at time of his offense); *Jimenez-Angeles v. Ashcroft*, 291 F.3d 594, 598–99 (9th Cir. 2002) (holding that § 1252(g) barred review over petitioner's claim that the INS should have commenced deportation proceedings against her immediately upon becoming aware of her illegal presence in the United States; but that the court retained jurisdiction over her constitutional claim that the application of IIRIRA's permanent rules was impermissibly retroactive); *Barahona-Gomez v. Reno*, 236 F.3d 1115, 1120–21 (9th Cir. 2001) (holding that § 1252(g) bars review of the discretionary, quasi-prosecutorial decisions by asylum officers and INS district directors to adjudicate cases or to refer them to IJs for hearing; but that it does not bar review of petitioners' challenge to the decision to indefinitely halt consideration of their applications for suspension of deportation); *Catholic Soc. Servs., Inc. v. INS*, 232 F.3d 1139, 1150 (9th Cir. 2000) (en banc) (holding that § 1252(g) did not deprive district court of jurisdiction to enter a preliminary injunction); *Dearinger ex rel. Volkova v. Reno*, 232 F.3d 1042, 1044 (9th Cir. 2000) (holding that § 1252(g) did not deprive district court of habeas jurisdiction); *Barapind v. Reno*, 225 F.3d 1100, 1109–10 (9th Cir. 2000) (holding that § 1252(g) did not affect the availability and scope of habeas review); *Sulit v. Schiltgen*, 213 F.3d 449, 453 (9th Cir. 2000) (holding that § 1252(g) did not deprive court of jurisdiction over habeas petitioners' due process claims that their green cards were improperly seized by the INS without a hearing); *Magana-Pizano v. INS*, 200 F.3d 603, 609 (9th Cir. 1999) (holding that § 1252(g) did not strip the district court of jurisdiction over petitioner's habeas petition); *Walters v. Reno*, 145 F.3d 1032, 1052 (9th Cir. 1998) (holding that § 1252(g) did not prohibit district court from enjoining deportation of aliens who raised general collateral challenges to unconstitutional agency practices).

VII. JURISDICTION OVER OTHER PROCEEDINGS

A. Jurisdiction Over Motions to Reopen

The denial of a motion to reopen is a final administrative decision generally subject to judicial review in the court of appeals. *See Sarmadi v. INS*, 121 F.3d 1319, 1321–22 (9th Cir. 1997) (concluding "that other recent changes to the INA did not alter our traditional understanding that the denial of a motion to reconsider or to reopen generally does fall within our jurisdiction over final orders of deportation"); *Singh v. Ashcroft*, 367 F.3d 1182, 1185 (9th Cir. 2004) (permanent rules); *see also* 8 U.S.C. § 1252(b)(6) ("When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order").

This court has held that it has jurisdiction over the BIA's denial of a motion to reopen even where the underlying request for relief is discretionary. *See Arrozal v. INS*, 159 F.3d 429, 431–32 (9th Cir. 1998) (holding that § 309(c)(4)(E) of the transitional rules did not bar review of the denial of petitioner's motion to reopen to apply for suspension). Specifically, "[t]he review of a motion to reopen in this context is distinct from the direct review of a denial of suspension of deportation, which is precluded when the BIA makes discretionary determinations of the threshold eligibility requirements." *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1223 (9th Cir. 2002) (holding that the court retained jurisdiction to review denial of motion to reopen arguing ineffective assistance of counsel and exceptional circumstances).

See also de Martinez v. Ashcroft, 374 F.3d 759, 761 (9th Cir. 2004) (holding that the court retained jurisdiction to review denial of motion to reopen to apply for adjustment of status); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 527 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(i) did not preclude review over the "discretionary aspects of the BIA's denial of Medina-Morales' motion to reopen" to apply for adjustment of status); *Zazueta-Carrillo v. Ashcroft*, 322 F.3d 1166, 1169–70 (9th Cir. 2003) (holding that § 1252(a)(2)(B)(i) did not bar review of the denial of a motion to reopen to apply for adjustment of status).

Note that the court is currently considering whether it has jurisdiction to consider a motion to reopen where the agency previously denied relief based on a discretionary hardship determination, and the motion to reopen provides new and/or additional evidence relevant to that hardship determination. *See, e.g.*,

Fernandez v. Gonzales, No. 02-72733 (arg. & sub. 9/13/05); *Tesfamarian v. Gonzales*, No. 03-72489 (arg. & sub. 9/13/05).

The court lacks jurisdiction to review the BIA's decision not to invoke its sua sponte authority to reopen proceedings under 8 C.F.R. § 1003.2(a). *See Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002).

B. Expedited Removal Proceedings

Under 8 U.S.C. § 1225(b)(1), the government may expedite removal of certain inadmissible aliens. *See Padilla v. Ashcroft*, 334 F.3d 921, 922–23 (9th Cir. 2003) (describing expedited removal procedure); *see also* 8 C.F.R. § 235.3(b). Under the expedited removal process, "the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum . . . or a fear of persecution." 8 U.S.C. § 1225(b)(1)(A)(i).

Except for limited habeas proceedings, "no court shall have jurisdiction to review . . . any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an [expedited] order of removal pursuant to section 1225(b)(1) of this title." 8 U.S.C. § 1252(a)(2)(A). Habeas proceedings in the expedited removal context are limited to determinations of:

> (A) whether the petitioner is an alien,
> (B) whether the petitioner was ordered removed under such section, and
> (C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee . . . or has been granted asylum . . . .

8 U.S.C. § 1252(e)(2).

C. Legalization Denials

The Immigration Reform and Control Act of 1986 ("IRCA") established a legalization or "amnesty" program for two groups of aliens: (1) those who entered the United States illegally before January 1, 1982, *see* 8 U.S.C. § 1255a, INA § 245A; and (2) Special Agricultural Workers ("SAWs"), *see* 8 U.S.C. § 1160, INA § 210.

Judicial review of a § 1255a legalization denial is available only during review of a final order of deportation or removal. *See Guzman-Andrade v. Gonzales*, 407 F.3d 1073, 1075 (9th Cir. 2005) (holding that the court continues to have jurisdiction to review the denial of a § 1255a legalization application when reviewing the final removal order of an individual who would have been placed in deportation proceedings prior to passage of IIRIRA) *Noriega-Sandoval v. INS*, 911 F.2d 258, 261 (9th Cir. 1990) (per curiam) (holding that the court lacked jurisdiction to review the Legalization Appeals Unit's denial of petitioner's application for adjustment to temporary resident status under IRCA because it did not arise in the context of a review of an order of deportation). "Thus, until the INS initiates deportation proceedings against an alien who unsuccessfully applies for legalization, that alien has no access to substantive judicial review of the LAU's denial." *Proyecto San Pablo v. INS*, 189 F.3d 1130, 1134 (9th Cir. 1999); *see also* 8 U.S.C. § 1255a(f)(4)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of deportation under section 1105a of this title (as in effect before October 1, 1996)."). The courts lack jurisdiction to review § 1255a legalization denials in exclusion proceedings. *Espinoza-Gutierrez v. Smith*, 94 F.3d 1270, 1278 (9th Cir. 1996) (holding that "the plain meaning of the statute precludes review of a legalization application in an exclusion proceeding").

For SAW denials, judicial review is available during review of a final order of deportation or exclusion. *See* 8 U.S.C. § 1160(e)(3)(A) ("There shall be judicial review of such a denial only in the judicial review of an order of exclusion or deportation under section 1105a of this title (as in effect before October 1, 1996)."); *see also Espinoza-Gutierrez*, 94 F.3d at 1278 (noting that for SAW applicants, "Congress did provide for judicial review of LAU denials in exclusion proceedings"). The SAW judicial review provision applies to judicial review of a final order of removal under 8 U.S.C. § 1252(a)(1). *Perez-Martin v. Ashcroft*, 394 F.3d 752, 757 (9th Cir. 2005). The BIA lacks jurisdiction to review the denial of SAW status. *Id.* at 758.

D. Registry

The transitional rules do not bar review of the denial of an application for registry under 8 U.S.C. § 1259. *See Beltran-Tirado v. INS*, 213 F.3d 1179, 1182–83 (9th Cir. 2000).

E. In Absentia Removal Orders

Any petition for review from an in absentia order of removal "shall . . . be confined to (i) the validity of the notice provided to the alien, (ii) the reasons for the alien's not attending the proceeding, and (iii) whether or not the alien is removable." 8 U.S.C. § 1229a(b)(5)(D); *see also Lo v. Ashcroft*, 341 F.3d 934, 936 (9th Cir. 2003). These limitations do not apply if the petitioner claims to be a national of the United States. *See* 8 U.S.C. § 1229a(b)(5)(D) (excluding cases described in 8 U.S.C. § 1252(b)(5)).

F. Reinstated Removal Proceedings

8 U.S.C. § 1231(a)(5) provides:

> Reinstatement of removal orders against aliens illegally reentering
>
> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

Id. (enacted in 1996, replacing the former reinstatement provision at 8 U.S.C. § 1252(f) (repealed 1996)).

Jurisdiction over reinstatement orders lies in the court of appeals. *See Castro-Cortez v. INS*, 239 F.3d 1037, 1043–44 (9th Cir. 2001) (holding that the new reinstatement provision does not apply to aliens who reentered the United States before April 1, 1997).

This court has addressed the revised reinstatement provisions in the following cases: *Morales-Izquierdo v. Ashcroft*, 388 F.3d 1299 (9th Cir. 2004) (holding that the reinstatement procedures in 8 C.F.R. § 241.8 violate the INA because they provide for reinstatement without the right to a hearing before an IJ) (opinion withdrawn pending rehearing en banc); *Perez-Gonzalez v. Ashcroft*, 379 F.3d 783, 784 (9th Cir. 2004) (holding that the reinstatement provisions are not impermissibly retroactive when applied to pre-1996 deportation orders); *Padilla v. Ashcroft*, 334 F.3d 921 (9th Cir. 2003) (declining to decide whether reinstated expedited removal order violates due process because petitioner could not show prejudice); *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1173–74 (9th Cir. 2001) (finding that reinstatement of prior removal order did not violate due process because petitioner already had one full and fair hearing); *Gallo-Alvarez v. Ashcroft*, 266 F.3d 1123 (9th Cir. 2001) (holding that the INS may reinstate an order of deportation pertaining to an individual who was granted voluntary departure in lieu of deportation).

G. Discretionary Waivers

1. Three and Ten-year Bars

"No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver" of the three and ten-year unlawful presence bars set forth in 8 U.S.C. § 1182(a)(9)(B)(i). 8 U.S.C. § 1182(a)(9)(B)(v) (stating that the "Attorney General has sole discretion to waive [the bars] in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established . . . that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien").

2. Document Fraud Waiver

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver" of the document fraud ground of inadmissibility in 8 U.S.C. § 1182(a)(6)(F)(i). 8 U.S.C. § 1182(d)(12).

3. Criminal Inadmissibility Waivers

"No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a [Section 212(h)] waiver." 8 U.S.C. § 1182(h).

4. Fraud Waivers

"No court shall have jurisdiction to review a decision or action of the Attorney General regarding a [Section 212(i)] waiver." 8 U.S.C. § 1182(i)(2).

H. Inadmissibility on Medical Grounds

An individual may not appeal an IJ's removal decision that is based solely on a medical certification that he or she is inadmissible under the health-related grounds in 8 U.S.C. § 1182(a)(i). *See* 8 U.S.C. § 1252(a)(3) ("No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.").

VIII. SCOPE AND STANDARD OF REVIEW

A. Scope of Review

1. Where BIA Conducts De Novo Review

"Where . . . the BIA reviews the IJ's decision de novo, our review is limited to the BIA's decision, except to the extent that the IJ's opinion is expressly adopted." *Shah v. INS*, 220 F.3d 1062, 1067 (9th Cir. 2000) (internal quotation marks omitted). Where the BIA conducts a de novo review, "[a]ny error committed by the IJ will be rendered harmless by the Board's application of the correct legal standard." *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995).

2. Where BIA Conducts Abuse of Discretion Review

"If . . . the BIA reviews the IJ's decision for an abuse of discretion, we review the IJ's decision." *de Leon-Barrios v. INS*, 116 F.3d 391, 393 (9th Cir. 1997); *see also Yepes-Prado v. INS*, 10 F.3d 1363, 1366–67 (9th Cir. 1993).

3. Where BIA Incorporates IJ's Decision

"Where . . . the BIA has reviewed the IJ's decision and incorporated portions of it as its own, we treat the incorporated parts of the IJ's decision as the BIA's." *Molina-Estrada v. INS*, 293 F.3d 1089, 1093 (9th Cir. 2002).

4. Where BIA's Standard of Review is Unclear

Where it is unclear whether the BIA conducted a de novo review, the court may also "look to the IJ's oral decision as a guide to what lay behind the BIA's conclusion." *Avetova-Elisseva v. INS*, 213 F.3d 1192, 1197 (9th Cir. 2000) (reviewing both opinions even though the BIA's "phrasing seems in part to suggest that it did conduct an independent review of the record," because "the lack of analysis that the BIA opinion devoted to the issue at hand–its simple statement of a conclusion–also suggests that the BIA gave significant weight to the IJ's findings.").

5. Streamlined Cases

One member of the BIA may summarily affirm or "streamline" an IJ's decision, without opinion, under 8 C.F.R. § 1003.1(e)(4) (formerly codified at 8 C.F.R. § 3.1(e)(4)) or 8 C.F.R. § 1003.1(a)(7) (formerly codified at 8 C.F.R. § 3.1(a)(7). "The practical effect of streamlining is that, unless the BIA opts for three-judge review, the IJ's decision becomes the BIA's decision and we evaluate the IJ's decision as we would that of the Board." *Lanza v. Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004) (internal quotation marks omitted).

When the BIA "streamlines a case, the decision of the IJ becomes the final agency determination; however, summary affirmance does not necessarily mean that the BIA has adopted or approved of the IJ's reasoning, only that the BIA approves the result reached." *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821 (9th Cir. 2004). This court has noted that "when the BIA invokes its summary affirmance procedures, it pays for the opacity of its decision by taking on the risk of reversal in declining to articulate a different or alternate basis for the decision should the reasoning proffered by the IJ prove faulty." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 786 (9th Cir. 2004) (internal quotation marks and alterations omitted).

In *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 848 (9th Cir. 2003), addressing streamlining in the context of a petition for review from the denial of cancellation of removal, the court held that the BIA's summary affirmance procedure did not violate due process; *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (same in asylum context).

a. Jurisdiction Over Regulatory Challenges to Streamlining

Where the underlying decision is a discretionary hardship determination, the court lacks jurisdiction over a regulatory challenge to the BIA's decision to streamline a case. *See Falcon Carriche*, 350 F.3d at 852–54; *Salvador-Calleros v. Ashcroft*, 389 F.3d 959, 962 (9th Cir. 2004) (same).

The court retains jurisdiction over regulatory challenges to streamlining in other cases. *See, e.g., Vukmirovic v. Ashcroft*, 362 F.3d 1247, 1253 (9th Cir. 2004) (holding that a regulatory challenge to streamlining in an asylum case is not beyond judicial review, but declining to reach the question because the court granted the petition); *Camposeco-Montejo v. Ashcroft*, 384 F.3d 814, 821–22 (9th Cir. 2004) (same); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 852 (9th Cir. 2003) (rejecting the government's contention that the BIA's decision to streamline a case is inherently discretionary, and therefore never subject to review); *Chen v. Ashcroft*, 378 F.3d 1081 (9th Cir. 2004) (petition for rehearing pending) (holding that the court had jurisdiction over regulatory challenge to streamlining, and concluding that the BIA erred in summarily affirming the IJ's denial of an application for adjustment of status under the Chinese Student Protection Act because the legal issue presented was not squarely controlled by existing BIA or federal court precedent).

However, where the court reaches the merits of the agency decision, it is "unnecessary and duplicative" to review the BIA's decision to streamline. *Nahrvani v. Gonzales*, 399 F.3d 1148, 1154-55 (9th Cir. 2005); *see also Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1078 (9th Cir. 2004) (stating that review of the BIA's decision to streamline a decision would be "superfluous" under the rationale set forth in *Falcon Carriche*).

b. Streamlining and Multiple Grounds

Where the BIA's affirmance without opinion leaves the court unable to discern whether it affirmed the IJ on a reviewable ground or an unreviewable ground, the court will remand the case to the BIA for clarification of the grounds for its decision. *See Lanza v. Ashcroft*, 389 F.3d 917, 924 (9th Cir. 2004) (remanding asylum case where it was unclear whether the BIA's affirmance without opinion was based on a reviewable ground (the merits of the asylum claim) or an unreviewable ground (untimeliness); *Diaz-Ramos v. Gonzales*, 404 F.3d 1118, 1118 (9th Cir. 2005) (per curiam order) (granting the government's motion to remand for clarification of grounds for summary affirmance without opinion of the denial of cancellation of removal); *San Pedro v. Ashcroft*, 395 F.3d 1156, 1157 (9th Cir. 2005) (remanding streamlined appeal for determination of whether BIA affirmed IJ's denial of waiver of removal on statutory or discretionary grounds); *see also Falcon Carriche v. Ashcroft*, 350 F.3d 845, 855 n.10 (9th Cir. 2003) (noting, but not reaching, the "potentially anomalous situation . . . where both discretionary and non-discretionary issues are presented to the BIA and the BIA's streamlining procedure prevents us from discerning the reasons for the BIA's decision").

However, where the court must necessarily decide the merits of the reviewable ground in the course of deciding the other claims for relief, "jurisprudential considerations that weighed in favor of remand to the BIA in *Lanza* do not apply." *Kasnecovic v. Gonzales*, 400 F.3d 812, 815 (9th Cir. 2005) (IJ denied asylum based on the non-reviewable one-year bar and reviewable adverse credibility grounds and the court affirmed the adverse credibility determination in reviewing the denial of withholding of removal and CAT relief).

c. Novel Legal Issues

The BIA errs in streamlining an appeal despite the presence of novel legal questions not squarely controlled by existing BIA or federal court precedent, factual and legal questions that are not insubstantial, a complex factual scenario, and applicability to numerous other aliens. *Chen v. Gonzales*, 378 F.3d 1081, 1086-87 (9th Cir. 2004) (remanding to the BIA for consideration of the novel legal issue in the first instance).

d. Streamlining and Motions to Reopen

"[W]here the BIA entertains a motion to reopen in the first instance, and then fails to provide specific and cogent reasons for its decision, we are left without a reasoned decision to review." *Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005). Accordingly, the BIA abuses its discretion when it summarily denies a motion to reopen without explanation. *Id.* (rejecting government's contention that the BIA's summary denial of a motion to reopen and remand was consistent with the BIA's streamlining procedures).

6. Review Limited to BIA's Reasoning

"[T]his court cannot affirm the BIA on a ground upon which it did not rely." *Navas v. INS*, 217 F.3d 646, 658 n.16 (9th Cir. 2000); *see also Hasan v. Ashcroft*, 380 F.3d 1114, 1122 (9th Cir. 2004) (rejecting government's contention that petitioners were ineligible for asylum because they could have relocated, because the IJ did not rely on internal relocation when denying asylum relief). In other words, "we must decide whether to grant or deny the petition for review based on the Board's reasoning rather than our independent analysis of the record." *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *see also Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency. If we conclude that the BIA's decision cannot be sustained upon its reasoning, we must remand to allow the agency to decide any issues remaining in the case.").

7. Review Generally Limited to Administrative Record

This court's review is generally limited to the information in the administrative record. *See Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (holding that the court is "statutorily prevented from taking judicial notice of the Country Report" that petitioner did not submit to the BIA). "We may review out-of-record evidence only where (1) the Board considers the evidence; or (2) the Board abuses its discretion by failing to consider such evidence upon the motion of an applicant." *Id.* at 964; *see also Circu v. Ashcroft*, 389 F.3d 938, 940 (9th Cir.

2004) (mandate pending) (holding that IJ's reliance on 1999 report rather than 1997 report in the record, was harmless or immaterial error when there was no significant difference between the reports); *Altawil v. INS*, 179 F.3d 791, 792 (9th Cir. 1999) (order) (denying motion to reconsider order striking petitioner's supplemental excerpts of record).

8. Judicial Notice

However, the court is not precluded from taking judicial notice of an agency's own records. *See Lising v. INS*, 124 F.3d 996, 998–99 (9th Cir. 1997) (taking judicial notice of application for naturalization). The court may take judicial notice of "dramatic foreign developments" that occur after the BIA's determination. *See Gafoor v. INS*, 231 F.3d 645, 655–56 (9th Cir. 2000) (taking judicial notice of Fijian coup which occurred after the BIA's decision). The court may also take judicial notice under Federal Rule of Evidence 201 of adjudicative facts not subject to reasonable dispute. *Singh v. Ashcroft*, 393 F.3d 903, 905 (9th Cir. 2004) (taking judicial notice of existence and operations of Indian counter-terrorism agency, and reversing negative credibility finding based on petitioner's lack of corroborative evidence).

9. No Additional Evidence

Under 8 U.S.C. § 1252(a)(1), "the court may not order the taking of additional evidence under section 2347(c) of Title 28." *See also Altawil v. INS*, 179 F.3d 791, 792–93 (9th Cir. 1999) (order) (denying motion for leave to adduce additional evidence); *Reyes-Melendez v. INS*, 342 F.3d 1001, 1006 (9th Cir. 2003).

10. Waiver

"Issues raised in a brief that are not supported by argument are deemed abandoned." *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259–60 (9th Cir. 1996) (holding that challenge to denial of motion to reopen, referred to in the statement of the case but not discussed in the body of the opening brief, was waived); *see also Chebchoub v. INS*, 257 F.3d 1038, 1045 (9th Cir. 2001) (petitioner failed to brief denial of motion to reopen); *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam) (declining to reach issue raised for the first time in the reply brief).

Cf. Mamouzian v. Ashcroft, 390 F.3d 1129, 1136 (9th Cir. 2004) (holding that petitioner did not waive challenge to future persecution finding, and refusing to "pars[e] her brief's language in a hyper technical manner"); *Ndom v. Ashcroft*, 384 F.3d 743, 750–51 (9th Cir. 2004) (rejecting government's contention that petitioner waived his asylum and withholding of removal claims by failing to articulate the proper standard of review or to argue past persecution); *Guo v. Ashcroft*, 361 F.3d 1194, 1199 (9th Cir. 2004) (rejecting government's contention that asylum applicant waived challenge to negative credibility finding because the issue was sufficiently argued in petitioner's opening brief); *Mejia v. Ashcroft*, 298 F.3d 873, 876 (9th Cir. 2002) (holding that the "failure to recite the proper standard of review does not constitute waiver of a properly raised merits issue").

a. Exceptions to Waiver

(i) No Prejudice to Opposing Party

The court has discretion to review an issue not raised in petitioner's briefs "if the failure to raise the issue properly did not prejudice the defense of the opposing party." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (reviewing repapering issue first raised in Fed. R. App. P. 28(j) letter and discussed at oral argument and in post-argument supplemental briefs); *see also Ndom v. Ashcroft*, 384 F.3d 743, 751 (9th Cir. 2004) (noting lack of prejudice because government briefed issue); *Singh v. Ashcroft*, 361 F.3d 1152, 1157 n.3 (9th Cir. 2004) (reviewing appropriateness of summary dismissal because the issue was briefed by the government, and thus the government suffered no prejudice).

(ii) Manifest Injustice

The court may also "review an issue not raised in an appellant's opening brief if a failure to do so would result in manifest injustice." *Alcaraz v. INS*, 384 F.3d 1150, 1161 (9th Cir. 2004) (internal quotation marks omitted) (concluding that the failure to review petitioners' repapering issue would result in manifest injustice).

See also "Waiver of Issue in Court of Appeals" in the Ninth Circuit's Appellate Jurisdiction Outline.

B. Standards of Review

The proper standard of review in immigration proceedings depends on the nature of the decision being reviewed. *See Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995) (discussing standards); *see also* 8 U.S.C. § 1252(b)(4) *and* Ninth Circuit Standards of Review Outline.

1. De Novo Review

Questions of law are reviewed de novo. *See, e.g., Chavez-Perez v. Ashcroft*, 386 F.3d 1284, 1287 (9th Cir. 2004) (equal protection challenge); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) (whether offense constitutes an aggravated felony); *Kankamalage v. INS*, 335 F.3d 858, 862 (9th Cir. 2003) (whether regulation had retroactive effect); *Vasquez-Zavala v. Ashcroft*, 324 F.3d 1105, 1107 (9th Cir. 2003) (due process challenge); *Taniguchi v. Schultz*, 303 F.3d 950, 955 (9th Cir. 2002) (district court's decision whether to grant or deny a petition for writ of habeas corpus); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1145 (9th Cir. 2002) (legal determination of whether petitioner's daughter was a qualifying "child").

"The BIA's interpretation of immigration laws is entitled to deference[, but] we are not obligated to accept an interpretation clearly contrary to the plain and sensible meaning of the statute." *Kankamalage v. INS*, 335 F.3d 858, 861 (9th Cir. 2003). Additionally, the court "will not defer to BIA decisions that conflict with circuit precedent." *Melkonian v. Ashcroft*, 320 F.3d 1061, 1065 (9th Cir. 2003). Moreover, the court will not defer to the BIA's interpretation of statutes that it does not administer. *See Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 843 (9th Cir. 2003) (holding that the court would not give deference to the INS's interpretation of the California Penal Code).

2. Substantial Evidence Review

The IJ's or BIA's factual findings are reviewed for substantial evidence. *See, e.g., Ramos-Vasquez v. INS*, 57 F.3d 857, 861 (9th Cir. 1995) (reviewing

denial of asylum, withholding, and negative credibility findings for substantial evidence). For instance, the BIA's determination that an applicant is not eligible for asylum "can be reversed only if the evidence presented by [the applicant] was such that a reasonable factfinder would have to conclude that the requisite fear of persecution existed." *INS v. Elias-Zacarias*, 502 U.S. 478, 481 & n.1 (1992) (noting that "[t]o reverse the BIA finding we must find that the evidence not only *supports* that conclusion, but *compels* it"); *see also Khourassany v. INS*, 208 F.3d 1096, 1100 (9th Cir. 2000) ("Under our venerable standards of review of BIA decisions, we may grant the petition for review only if the evidence presented . . . is such that a reasonable fact-finder would be compelled to conclude that the requisite fear of persecution existed."); *cf. Singh v. Ilchert*, 63 F.3d 1501, 1506 (9th Cir. 1995) (reviewing de novo the BIA's determination that petitioner's harm was not on account of political opinion because the question involved "the application of established legal principles to undisputed facts").

"The substantial evidence test is essentially a case-by-case analysis requiring review of the whole record. Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Turcios v. INS*, 821 F.2d 1396, 1398 (9th Cir. 1987) (internal citation omitted). "[W]e do not reverse the BIA simply because we disagree with its evaluation of the facts, but only if we conclude that the BIA's evaluation is not supported by substantial evidence." *Aruta v. INS*, 80 F.3d 1389, 1393 (9th Cir. 1996) (internal quotation marks omitted); *see also Ghebllawi v. INS*, 28 F.3d 83, 85 (9th Cir. 1994) ("The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.").

The permanent rules define the substantial evidence standard by stating that "the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C § 1252(b)(4)(B); *see also Tawadrus v. Ashcroft*, 364 F.3d 1099, 1102 (9th Cir. 2004) (quoting 8 U.S.C § 1252(b)(4)(B)). The previous jurisdictional statute provided that "findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive." 8 U.S.C. § 1105a(a)(4) (repealed 1996).

3. Abuse of Discretion Review

"If the agency determines that the alien is statutorily eligible for relief, but denies such relief as a matter of discretion, we review that denial for an abuse of discretion." *Manzo-Fontes v. INS*, 53 F.3d 280, 282 (9th Cir. 1995).

The BIA's denial of a motion to reopen or reconsider is reviewed for abuse of discretion. *See Cano-Merida v. INS*, 311 F.3d 960, 964 (9th Cir. 2002); *see also Movsisian v. Ashcroft*, 395 F.3d 1095, 1098 (9th Cir. 2005) (same standard for denial of motion to remand). The discretionary decision to deny asylum to an eligible petitioner is also reviewed for abuse of discretion. *See Kalubi v. Ashcroft*, 364 F.3d 1134, 1137 (9th Cir. 2004); *see also* 8 U.S.C. § 1252(b)(4)(D) ("the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion").

The BIA abuses its discretion when it acts "arbitrarily, irrationally, or contrary to the law." *See Lainez-Ortiz v. INS*, 96 F.3d 393, 395 (9th Cir. 1996). "The BIA abuses its discretion when it fails to comply with its own regulations." *Iturribarria v. INS*, 321 F.3d 889, 895 (9th Cir. 2003).

a. Failure to Provide Reasoned Explanation

The court has "long held that the BIA abuses its discretion when it fails to provide a reasoned explanation for its actions." *Movsisian v. Ashcroft*, 95 F.3d 1095, 1098 (9th Cir. 2005) (holding that BIA abused its discretion by denying motion to remand without any explanation); *see also Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address petitioner's ineffective assistance of counsel claim); *Rodriguez-Lariz v. INS*, 282 F.3d 1218, 1227 (9th Cir. 2002) (remanding motion to reopen to apply for suspension of deportation where BIA did not engage in substantive analysis or articulate any reasons for its decision); *Arrozal v. INS*, 159 F.3d 429, 432 (9th Cir. 1998) (stating that the "BIA abuses its discretion when it fails to state its reasons and show proper consideration of all factors when weighing equities and denying relief" (internal quotation marks and emphasis omitted)); *Kalubi v. Ashcroft*, 364 F.3d 1134, 1141–42 (9th Cir. 2004) (holding that conclusory statements are insufficient, and that the BIA must provide an explanation showing that it has

"heard, considered, and decided" the issue (internal quotation marks omitted)).

b. Failure to Consider Arguments

"IJs and the BIA are not free to ignore arguments raised by [a party]." *Sagaydak v. Gonzales*, 405 F.3d 1035, 1040 (9th Cir. 2005) (holding that the IJ erred in failing to consider extraordinary circumstances proffered to excuse petitioner's untimely asylum application). "Immigration judges, although given significant discretion, cannot reach their decisions capriciously and must indicate that how they weighed factors involved and how they arrived at their conclusion." *Id.* (internal quotation marks and citations omitted). *See also Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005) (remanding in light of the BIA's unexplained failure to address petitioner's ineffective assistance of counsel claim); *Chen v. Ashcroft*, 362 F.3d 611, 620 (9th Cir. 2004) (holding that an IJ erred in failing to consider an explanation offered to explain a witness's failure to testify at a hearing).

C. Boilerplate Decisions

"[W]e do not allow the Board to rely on 'boilerplate' opinions 'which set out general legal standards yet are devoid of statements that evidence an individualized review of the petitioner's circumstances.'" *Ghaly v. INS*, 58 F.3d 1425, 1430 (9th Cir. 1995) (quoting *Castillo v. INS*, 951 F.2d 1117, 1121 (9th Cir. 1991)). The BIA's decision "must contain a statement of its reasons for denying the petitioner relief adequate for us to conduct our review." *Id*. However, this court will not impose "unnecessarily burdensome or technical requirements." *Id*. As long as the BIA provides "a comprehensible reason for its decision sufficient for us to conduct our review and to be assured that the petitioner's case received individualized attention," remand will not be required. *Id*.